UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

OLEG URITSKY, Plaintiff v. R. RICHARD NEWCOMB, DIRECTOR OF FOREIGN ASSETS CONTROL, UNITED STATES DEPARTMENT OF TREASURY, et al., Defendants	Civil Action No. 03-10569-PBS

MEMORANDUM AND ORDER

May 19, 2004

Saris, U.S.D.J

I. INTRODUCTION

The embargo against tourist travel to Cuba is still in effect. Plaintiff Oleg Uritsky, a student, was penalized $7,500 for a one-week vacation trip to Cuba, which cost $821.81. An extra $10 was tacked on for the bottle of rum he imported. The Office of Foreign Assets Control ("OFAC") imposed the civil penalty on the ground that plaintiff engaged in unlicensed travel-related transactions in violation of the Cuban Assets Control Regulations ("CACR"), 31 C.F.R. part 515 (1963), promulgated under The Trading With the Enemy Act ("TWEA"), 50 U.S.C. App. §5(b)(1). Asserting that he falls within the "fully-hosted traveler exception", Uritsky argues that the agency

decision was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. §706(2)(A). Defendant R. Richard Newcomb, Director of OFAC, moves for summary judgment on the ground that plaintiff booked the trip with his credit card. Defendant argues that even if Uritsky's father, a Russian citizen, later paid the credit card company for the trip, plaintiff did not qualify as a "fully hosted traveler" because of his pre-payment of the trip with his credit card. After hearing, the Defendant's motion for summary judgment is **ALLOWED.**

II. BACKGROUND

The administrative record contains evidence of the following facts.

On August 20, 2000, Plaintiff, a student, departed from Montreal, Canada aboard Cubana Airlines, a Cuban national airliner, for a one-week vacation in Cuba. On August 28, 2000, returning on Cubana Airlines, he re-entered the United States through Highgate Springs, Vermont carrying a bottle of rum purchased in Cuba, and was questioned by U.S. Customs officials. Admitting that he did not travel to Cuba under either a general or specific license, Uritsky stated that he paid a Canadian travel agency $1195 (CAN)(USD $822.81) for the package tour using his credit card. Plaintiff then provided Customs with his current address.

On May 10, 2001, OFAC sent a pre-penalty notice to Plaintiff

by certified mail notifying him that the Director of OFAC had reason to believe that Plaintiff engaged in unlicensed travel-related transactions by vacationing in Cuba and that OFAC intended to impose a monetary fine in the amount of $7,510, which included $7,500 for the travel-related transactions and $10 for the bottle of rum. The notice further informed Plaintiff that he had 30 days to respond in writing requesting a hearing and pre-hearing discovery. The pre-penalty letter, sent by certified mail with return-receipt requested, was returned to OFAC as unclaimed. Because Plaintiff never received the letter, OFAC did not receive a timely response or a written request for a hearing.

On July 30, 2001, OFAC issued a penalty notice, which included a copy of the pre-penalty notice, to Plaintiff regarding the violations in association with his vacation in Cuba. Plaintiff received the penalty notice on August 4, 2001 and sent a written response on August 30, 2001. Informing the agency that the July 30th letter was his first knowledge of the pending OFAC action, Plaintiff requested an agency hearing and the opportunity to review related documents. OFAC rejected the request for a hearing as untimely.

On March 28, 2003, Plaintiff filed this lawsuit seeking review of the final agency action imposing the civil penalty. In his lawsuit, Plaintiff claimed a defense of being a "fully-hosted" traveler under 31 C.F.R. §515.420. Plaintiff claimed

that his father, a Russian citizen, paid for all of Plaintiff's travel-related transactions to Cuba. OFAC agreed to reconsider the penalty against Plaintiff in light of the "fully-hosted traveler" defense. This Court granted the parties' joint motion to stay proceedings, and Plaintiff supplemented the documentation pertaining to the transactions in connection with the trip to Cuba. Among other things, Plaintiff produced an American Express account report prepared for Oleg Uritsky showing a purchase from "Tourse Mtroyal NoverMontreal" of Quebec for an amount of 1,198 Canadian dollars and affidavits from Plaintiff and Boris Uritsky, his father, stating that the trip was ultimately paid for by Plaintiff's father.

According to Plaintiff's last iteration, the Cuba tour was purchased on an American Express account held jointly by Plaintiff, his father and Yevegenia Uriskaya, all of whom were jointly and severally liable for charges made to the account.[1] Plaintiff "booked" (his counsel's verb) the tour with the American Express card, but his father subsequently paid for it in

[1] The American Express account numbers are confusing. Plaintiff submitted a page of an American Express account entitled "Business Account-85002" showing that Oleg Uritsky is assigned account number 85002, Yevegenia Uriskaya is assigned account number 83015 and Boris Uritsky is assigned account number 83023. The page from an American Express account, prepared for Plaintiff with an account number ending in 83007, showed a purchase from Tours Mtroyal NouverMontreal of Quebec totaling 1,198 Canadian dollars on July 28, 2000. It is unclear who was assigned account number 83007. However, other items in this report include purchases in the Washington, D.C. area.

cash at the American Express Office in Russia. No receipt for payment was provided to OFAC.

On November 20, 2003, after consideration of the entire record, OFAC determined that Plaintiff was not a "fully-hosted" traveler since Plaintiff had paid for the trip using his credit card in violation of TWEA and CACR.

III. DISCUSSION

A. Judicial Review Standard for Agency Action

When reviewing a final agency action, a court may set aside an agency decision only when that decision is arbitrary, capricious or otherwise contrary to law. See 5 U.S.C §706(2)(A)-(D). "An agency rule is arbitrary and capricious if the agency lacks a rational basis for adopting it- for example, if the agency relied on improper factors, failed to consider pertinent aspects of the problem, offered a rationale contradicting the evidence before it, or reached a conclusion so implausible that it cannot be attributed to a difference of opinion or the application of agency expertise." Associated Fisheries of Maine, Inc. v. Daley, 127 F.3d 104, 109 (1st Cir. 1997)(citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 43 (1983)); R.I. Higher Educ. Assistance Auth. V. Sec'y of Educ., 929 F.2d 844, 855 (1st Cir. 1991). Although the court is obligated to scrutinize the facts, the ultimate standard of review is narrow and the court may not substitute its

judgment for that agency. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

B. Regulatory Definition of "Fully-Hosted" Traveler

Under the CACR, travel-related transactions involving Cuba are severely restricted. Twenty years ago, the Supreme Court rejected a challenge to the constitutionality of the embargo. See Regan v. Wald, 468 U.S. 222, 224-25 (1984) (concluding that in light of Cuba's "political, economic, and military backing" by the Soviet Union and its support for "armed violence and terrorism in the western hemisphere," there is an adequate basis under the due process clause to sustain the President's decision[2] to curtail the flow of hard currency to Cuba -- currency that could be used in support of Cuban adventurism -- by restricting travel.")

Except as specifically authorized by the Secretary of the Treasury, CACR prohibits all "transactions involv[ing] property in which [Cuba] or any national thereof, has . . . any interest of any nature, direct or indirect . . ." 31 C.R.F. § 515; 201(b). The regulations prohibit spending money relating to Cuban travel unless the traveler has either a general or specific license issued by OFAC. 31 C.F.R. §§ 515.201(b)(1), 515.560(a). A "fully hosted" traveler may travel to Cuba without first

[2] Both houses of Congress have recently voted to ease travel restrictions to Cuba but the provision was deleted in conference. (H.R. 2989 108th Cong. §745(2003)).

obtaining authorization from OFAC prior to travel under 31 C.F.R. § 515.420, which provides:

> (a) A person subject to the jurisdiction of the United States will not be considered to violate the prohibition on engaging in travel-related transactions in which Cuba has an interest when all costs of, and all transactions related to, the travel of that person (the "fully-hosted" traveler) are covered or entered into by a person not subject to the jurisdiction of the United States, provided that:
>
> (1) No person subject to the jurisdiction of the United States has made any payments or transferred any property or provided any service to Cuba or a Cuban national in connection with such fully-hosted travel or has prepaid or reimbursed any person for travel expenses, except as authorized in paragraph (b) of this section; and
> (2) The travel is not aboard a direct flight between the United States and Cuba authorized pursuant to §515.572.
>
> (b) Travel will be considered fully hosted notwithstanding a payment by a person subject to the jurisdiction of the United States for transportation to and from Cuba, provided that a carrier furnishing the transportation is not a Cuban national. Persons authorized as travel service providers pursuant to §555.572 may book passage on behalf of fully-hosted travelers through to Cuba, provided that such travel is not on a direct flight from the United States and that the carrier furnishing the transportation is not a Cuban national.

(emphasis added). An unlicensed person subject to U.S. jurisdiction who travels to Cuba is presumed to have engaged in prohibited travel related transactions. See 31 C.F.R. § 515.420 (c). However, he may rebut that presumption with relevant

documentation to support a fully-hosted traveler status. Id. In addition, the fully hosted traveler must provide an original signed statement from the sponsor or host that confirms that the individual's travel was fully-hosted and provide the reasons for the travel. Id.

The record amply supports the agency's conclusion that plaintiff was not a fully-hosted traveler. Initially, Plaintiff admitted to U.S. Customs that he paid for the trip using his credit card. However, once he received the pre-penalty notice, his story changed. Backpeddling, he claimed that his father paid for the trip. While Plaintiff's father submitted an affidavit stating he paid the credit card bill in Russia, Plaintiff has been unable to produce a receipt, credit card report, or any type of proof of payment by his father to corroborate that his father actually paid for the vacation. Furthermore, the account number on the American Express statement submitted by Boris Uritsky was redacted and the actual credit card report, which reflects the booking of the Cuba trip, also shows purchases in America. Only after the government pressed for more information did Plaintiff's counsel admit that Plaintiff booked the trip with his credit card. In light of plaintiff's shifting story, it was not unreasonable for the agency to rely on plaintiff's initial statement to the U.S. Customs Service and conclude that Plaintiff "charged the cost of the tour package to a credit card in [his]

name and for which [he] is liable;" and that "these actions constituted prepayment by [him] of [his] Cuba travel-related expenses." Even if Plaintiff's father eventually remitted the funds to American Express for the Cuba trip in Russia, Plaintiff still prepaid for the trip using a credit card for which he was financially liable. Thus, the agency was not arbitrary when it determined that Plaintiff is disqualified as a "fully-hosted" traveler according to 31 C.F.R. §515.420(a)(1) even if there was after-the-fact reimbursement.[3]

V. ORDER

Defendant's motion for summary judgment (Docket No. 61) is **ALLOWED**.

PATTI B. SARIS
United States District Judge

[3] The complaint challenges the adequacy of the notice and lack of hearing. This issue was resolved by the joint motion for a stay. It is worth noting that the agency was unreasonable in concluding that an unclaimed certified letter constituted adequate notice under §515.702(c)(1), which provides that service of the prepenalty notice be made by registered or certified mail. When the letter was returned as "unclaimed", the presumption was rebutted. §515.702(c)(2) provides for service by mailing in the event a certified letter is not accepted or served. That latter form of service was never made. In light of the agency's failure to give Plaintiff adequate initial notice and its refusal to afford him any hearing until he filed suit, at the hearing the agency agreed that any interest or further penalty in addition to the $7,510 is inappropriate.